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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936

No. 660

ELBERT B. LINDSEY AND E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PETITIONERS.

SPENCER GORDON,
Counsel for Petitioners.

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Report of Opinion Below.

The opinion of the Supreme Court of Washington (R. 87) is reported in 87 Wash. 298, 52 Pac. (2d) 1246.

Jurisdiction.

This case is on certiorari to the Supreme Court of the State of Washington under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat.

936, 28 U. S. C. A. § 344. The judgment of the Supreme Court of Washington was entered November 2, 1936 (R. 76). The petition for certiorari was filed in this Court January 16, 1937, and the writ was granted April 5, 1937.

Question for Argument.

By order of this Court entered April 5, 1937:

> "The petition for writ of certiorari to the Supreme Court of the State of Washington is granted, limited to the question as to whether Chapter 114 of the Laws of Washington of 1935, as here applied, is invalid as an *ex post facto* law within the meaning of Art. I, Sec. 10, of the Constitution."

Statement of the Case.

The petitioners, who had been found guilty of larceny, were sentenced under a statute which went into effect after the date of the commission of the alleged crime. It is their contention that this statute altered the situation to their disadvantage by inflicting a greater punishment than did the statute applicable when the alleged crime was committed.

September 4, 1935, an information was filed, in the Superior Court of the State of Washington in and for the County of Spokane, against the petitioners, Elbert B. Lindsey and E. R. Lindsey, charging them with the crime of grand larceny, in that "on or about the 15th day of April, 1935" they fraudulently obtained $40 by means of a bad check (R. 1).

September 14, 1935, the petitioners were found guilty of grand larceny (R. 49).

November 1, 1935, the petitioners were sentenced to be punished—

> "by confinement * * * for a term of not more than fifteen years, * * *"

with costs (R. 50, 51).

On appeal to the Supreme Court of Washington the petitioners assigned as error—

> "The law under which defendants were tried, convicted and sentenced was, and is, as to them void, being an *ex post facto* law being in direct violation of Section 10 of Article I, of the Constitution of the United States: 'No state shall • • • pass any • • • *ex post facto* law.''

This point was elaborated in the assignment (R. 63, 64).

November 2, 1936, the Supreme Court of Washington affirmed the judgment of the Superior Court (R. 76). In its opinion the Court stated in part:

> "We are obliged to conclude that chapter 114, Laws of 1935, does not violate the prohibition contained in the Federal Constitution regarding the passage of *ex post facto* laws" (R. 91, 92).

Statutes Involved.

Statute in Effect April 15, 1935, the Date of the Alleged Crime.

The petitioners were convicted of larceny under certain statutes of the State of Washington contained in Remington's Revised Statutes 2601 (2) and 2601-2 (R. 1, 44, 49), which were in effect when the alleged crime was committed and at the time of sentence. There is no contention that there was any change in the definition of larceny. The change in statute had to do with the penalty.

On April 15, 1935, the date of the alleged crime, the penalty for grand larceny was "imprisonment in the state penitentiary for not more than fifteen years". Rem. Rev.

Stat. 2605. No minimum term was prescribed. It was further provided that "the Court must pronounce judgment", "the defendant must be personally present", and "be • • • asked whether he have any legal cause to show why judgment should not be pronounced against him". (Rem. Rev. Stat. 2190, 2196, 2198.)

On April 15, 1935, there were also in effect the following sections of Rem. Rev. Stat.:

Section 2281 provided for indeterminate sentences for conviction of any felony "for which no fixed period of confinement is imposed by law". The indeterminate sentence was to be "for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense • • • and where no minimum term of imprisonment is prescribed by law, the Court shall fix the same in his discretion at not less than six months nor more than five years; • • •"

Section 2282, as modified by Section 10803, provided for a parole board, which might "at any time after the expiration of the minimum term of imprisonment • • • direct that any prisoner • • • shall be released on parole • • •"

Statute in Effect November 1, 1935, under which Sentence Was Pronounced.

June 12, 1935, after the commission of the alleged crime, there went into effect a statute contained in Chapter 114 of the Laws of Washington for 1935. (See also fly leaf Laws 1935.)

This statute repealed Section 2281, Rem. Rev. Stat. providing for indeterminate sentences, and Section 2282 thereof providing for parole after the minimum term, together with other statutory provisions not directly involved in this case.

In lieu of the provisions repealed the said Chapter 114 provided as follows:

> "When a person is convicted of any felony [with certain exceptions not material], the court * * * shall fix the maximum term of such person's sentence only.
>
> "The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; * * *."

Within six months after the admission of the convicted person to the penitentiary the board of prison, terms and paroles—

> "* * * shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense * * *."

If a convicted person undergoing sentence commits any infraction of the rules and regulations the board—

> "* * * may revoke any order theretofore made determining the length of the time such convicted person shall be imprisoned, and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted * * *."

A convicted person may be released on parole by the board after serving the period of confinement fixed by the board less time credits for good behavior and diligence not exceeding "one-third of his sentence as fixed by the board", and the board has power—

> "* * * to return such person to the confines of the institution from which he or she was paroled, at its discretion."

The Governor is also authorized to cancel and revoke paroles granted by the board.

The act further provides:

> "From and after the suspension, cancellation, or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term."

Sentence was pronounced upon the petitioners pursuant to Chapter 114 of the Laws of Washington for 1935. This is shown by the fact that the sentence was "for a term of not more than fifteen years" (R. 50, 51). Had the sentence been under the statute in effect prior to June 12, 1935, maximum and minimum terms would have been fixed. The opinion of the Supreme Court of Washington states that the sentence was under the Act of 1935 (R. 90, 91).

Specification of Error.

Petitioners contend that the Supreme Court of the State of Washington erred in holding that the sentences of petitioners did not violate the inhibition contained in Section 10, Article I, of the Constitution of the United States against *ex post facto* laws.

Summary of Argument.

The Act of 1935 in its application to the petitioners is an *ex post facto* law in that it changes to the disadvantage of the petitioners the punishment annexed to the alleged crime of grand larceny. The new law deprives the petitioners of an opportunity to be heard on the question of the duration of their confinement, and apparently deprives

them even of the right to be notified of such duration. It postpones final determination of the maximum term of imprisonment, and increases the possible maximum term by providing that a paroled person shall be considered an escapee during the period between revocation of parole and reconfinement. It deprives the petitioners of the right to apply for parole after a minimum sentence of from six months to five years. In a similar case, the United States District Court has ordered the release of a person sentenced under the Act of 1935 for the crime of grand larceny committed before it went into effect.

Argument.

Any Law Is Ex Post Facto Which Inflicts a Greater Punishment Than the Law Annexed to the Crime When Committed or Which Alters the Situation of the Accused to His Disadvantage.

Section 10 of Article I of the Constitution of the United States provides:

> "No State shall • • • pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, • • •."

The leading case on *ex post facto* laws is *Calder* v. *Bull*, 3 Dall. 386, 1 L. Ed. 648, where Mr. Justice Chase promulgated the following definition:

> "I will state *what laws* I consider *ex post facto laws*, within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was,

when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender* • • • (P. 390).

"But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the *criminal* law; but only those that *create*, or *aggravate*, the *crime*; or encrease the punishment, or change the rules of evidence, *for the purpose of conviction*" (P. 391).

In *ex Parte Medley*, 134 U. S. 160, 33 L. Ed. 835, this Court said:

"• • • any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed; • • • or which alters the situation of the accused to his disadvantage; • • •" (P. 171).

Examples of statutes involving punishments which have been held *ex post facto* include:

DEFERRING THE EXACT DETERMINATION OF THE PUNISHMENT AND KEEPING THE CONVICTED PERSON IN SUSPENSE.

In *Hartung* v. *People*, 22 N. Y. 95, the new statute provided for one year at hard labor and execution thereafter at any time upon the order of the Governor with or without notice, instead of execution after a period of not less than four nor more than eight weeks as fixed by the court. The opinion states:

"The sword is indefinitely suspended over his head, ready to fall at any time. It is not enough to say, if even that can be said, that most persons would prob-

> ably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the constitution, that it changes the punishment, after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case; that would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law" (Pp. 105-106).

In *Medley, Petitioner*, 134 U. S. 160, 33 L. Ed. 835, a statute was held *ex post facto* which conferred upon the warden of the penitentiary the power to fix the date of execution and which compelled him to withhold the knowledge of the date from the offender. This Court said:

> "Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place" (P. 172).

Increasing the Minimum Punishment.

In *Beard* v. *Maryland*, 74 Md. 130, 21 Atl. 700, the statute imposed a fine of not less than $50 nor more than $300 or imprisonment in jail for not less than ten days nor more than six months or both fine and imprisonment for keeping a disorderly house, which act had theretofore been a common law misdemeanor with a punishment of a fine or imprisonment both in the discretion of the court. It was held:

> "As the Act of 1890 makes the minimum penalty for the offense greater than the lowest limit at common law, it is quite apparent that the statute is as to Beard

an *ex post facto* law, and that he cannot be punished under it" (P. 132).

Lindzey v. *The State*, 65 Miss. 542, 5 So. 99, involved a statute which changed the penalty for carrying concealed weapons from a fine not exceeding $100, and in the event the fine and costs be not paid, then work at hard labor not exceeding two months, to a fine not exceeding $100 nor less than $25, and in the event the fine and costs be not paid then hard labor not exceeding two months nor less than one month. The statute was held *ex post facto* as to an act committed before its passage "because it changed but did not mitigate the punishment for the offense" (P. 545).

In *Commonwealth* v. *McDonough*, 13 Allen (95 Mass.) 581, a statute was held *ex post facto* which changed the punishment for keeping a disorderly house from a fine of not less than $200 nor more than $1,000 *or* imprisonment for not more than a year, to a fine of not less than $50 nor more than $100 *and* imprisonment for not less than three months nor more than twelve, although the new statute provided that the punishment might be by fine *or* imprisonment in all cases where the offender should prove that he had not before been convicted of a similar offense. The Court pointed out that there was an increase in the minimum prison sentence.

Taking Away the Right to Apply for Parole

In *State* v. *Board of Parole*, 155 La. 699, 99 So. 534, one Woodward had applied for mandamus to compel the Parole Board to file and consider his application. Woodward had been sentenced to a life term in 1914 under a statute permitting paroles to convicts serving life sentences. Under a subsequent act of 1916 life-termers were excluded

from parole. The Board of Parole was ordered to file and to consider the application, the Court saying:

> "There can be no doubt but that the right to be considered for a parole, after the expiration of one-third of the actual time required to be served, with the benefit of commutation under other laws (in his case something in excess of three years), was a substantial one; • • • Of course, the right was not absolute or fixed in the sense that he was bound to be paroled; but the privilege of having his case submitted to the discretion of the board at the proper time did exist; whereas, now, it is entirely taken away, and the board cannot even consider it under the present law.
>
> "It would seem clear, therefore, that to give the Laws of 1916 a retrospective effect would operate seriously to his disadvantage, in violation of the inhibition of the Constitution against ex post facto laws" (p. 704).

LENGTHENING TERM BY EXCLUDING PERIOD AT LARGE AFTER VIOLATION OF PAROLE.

State v. *Tyree*, 70 Kan. 203, 78 Pac. 525, involved a statute which provided that if a prisoner violated a parole he should be arrested and compelled to serve out the unexpired term of the maximum imprisonment, and that the time from the date of his declared delinquency to the date of his arrest should not be counted as any portion or part of the time served. The Court said:

> "• • • Other provisions of the act authorize the prison board to make prison rules and stipulate conditions in the parole, a violation of which, although not a violation of any law, would subject the paroled prisoner to rearrest and reimprisonment. The time between the declared delinquency and the arrest not being deducted from the maximum time, the period

within which appellant might obtain his liberty is extended beyond the maximum time for which he could have been sentenced under the law in existence when the offense was committed, this excess of time depending upon the activity, or negligence, of the officers whose duty it would be to issue or execute a warrant for the arrest. For these reasons the sentence imposed was *ex post facto*, and should be set aside" (pp. 209-210).

INCREASING THE PUNISHMENT IN OTHER RESPECTS.

Addition of imprisonment by solitary confinement until execution, *Medley, Petitioner*, 134 U. S. 160, 33 L. Ed. 835. Providing that prisoners released for good behavior shall be on parole, *People of the United States* v. *McDonnell*, 11 Fed. Supp. 1014.

The Effective Date of the Statute is the Material Date in Determining Whether it Is an Ex Post Facto Law.

Chapter 114 of Laws of Washington for 1935 was approved by the Governor March 20, 1935, but it did not go into effect until June 12, 1935, which was ninety days after the adjournment of the legislature. (See flyleaf to Laws 1935.)

In the two decisions of the United States District Court discussed in the last section of this brief, Ch. 114, Laws 1935, was held *ex post facto* because it went into effect after the commission of the alleged crimes involved in the cases. In the opinion of the Supreme Court of the State of Washington in this case there is no suggestion that any date other than the effective date of the act is the material date in determining whether or not it is *ex post facto* (R. 90).

In *State* v. *Smith*, 56 Ore. 21, 107 Pac. 980, a statute was held *ex post facto* which increased the punishment for a

crime committed after the statute was filed with the Secretary of State but before it became effective ninety days later. In *People* v. *McDonnell,* 11 F. Supp. 1014, the effective date of the act was taken as the significant date.

June 12, 1935, should therefore be taken as the material date in determining whether Ch. 114, Laws 1935, is an *ex post facto* law.

The Act of 1935 Inflicted a Greater Punishment than the Law Annexed to the Alleged Crime at the Time it was Committed and Altered the Situation of the Petitioners to Their Disadvantage.

The decision of the Supreme Court of Washington was based on the following reasoning:

> "The amending act does not change or inflict a greater punishment than the law in force when the alleged crime was committed, for the court could under the law in force at that time pronounce a maximum sentence of not more than fifteen years. The minimum and maximum punishments remained the same as before the enactment of the Act of 1935" (R. 91).

It is respectfully submitted that this statement indicates a failure to analyze the provisions of the statutes.

In the following respects the Act of 1935 altered the situation to the disadvantage of the petitioners:

1. *Deprivation of opportunity to be heard on question of duration of confinement and of right to be notified of decision:* By the law of Washington the defendant must be personally present when sentenced and must be given an opportunity to make a statement. Thus in this case

each petitioner made "his statement" before judgment was entered (R. 50, 51). This was a valuable privilege under the law existing at the date of the commission of the alleged crime, for the duration of confinement was determined by the sentence of the court. But under the later statute the court has no discretion in imposing sentence, so that the opportunity of the defendants to be present and make a statement to the court is of no advantage to them. The duration of confinement is fixed by the board of prison terms and paroles "not to exceed the maximum provided by law for the offense". There is no requirement that the convicted person shall be present when the term is fixed, and there is no provision for any statement to be made by the convicted person. There is not even any statutory requirement that the convicted person shall be notified of the term fixed by the board.

2. *Postponement of final determination of maximum penalty, and increase in possible maximum penalty:* As stated by the Supreme Court of Washington, under either statute, the maximum penalty *may* be fifteen years. But under the earlier statute the judge might fix the maximum in his discretion at less than fifteen years, and at the end of the time so fixed the convicted person would certainly have gone free. Whereas, under the later statute, after the board has *originally* fixed the term, if the convicted person commits an infraction of the rules the board may "make a new order determining the length of time he shall serve, not exceeding the maximum penalty provided by law for the crime". Thus, under the earlier statute if the court in its discretion fixed a maximum sentence of three years the convicted person could not serve for more than three

years. His term would then be over. But under the later statute if the board in the exercise of its discretion originally fixes a term of three years, the convicted person will have hanging over him the possibility that the sentence may be thereafter increased to fifteen years because of an infraction of the rules. Such a sentence may even run for more than fifteen years in the case of a person who has been paroled and whose parole has been revoked, for no part of the time during the period between such revocation and his return to custody is to be considered a part of his term.

3. *Increase in minimum penalty:* As stated by the Supreme Court of Washington, the minimum sentence under either statute *may* be six months. But under the earlier statute the convicted person had the absolute right to a minimum sentence of not more than five years, after which time he was entitled to apply for parole. Whereas, under the later statute, the board may fix as the duration of confinement any term not exceeding the maximum provided by law, and the convicted person cannot be paroled until the term fixed by the board has expired, less time credits for good behavior not exceeding one-third of the sentence as fixed by the board. Thus, the petitioners in this case would have been entitled as of right under the earlier statute to a minimum sentence of not more than five years, after which time they could have applied for parole, whereas, under the later statute pursuant to which they were sentenced, the board might, originally or by redetermination, fix their term at eight years or more, so that even after allowing them one-third credit for good behavior they would necessarily be confined for more than five years. *Petitioners have thus lost the valuable right to apply for parole after five years.*

In a Similar Case the United States District Court Has Ordered the Release of a Person Sentenced Under the Act of 1935 for the Crime of Grand Larceny Committed Before It Became Effective.

Copy of a decision of District Judge Cavanah November 21, 1936, in the District Court of the United States for the Western District of Washington, Southern Division, in the case of *Andrus* v. *McCauley*, is attached to the petition for certiorari in this case as Appendix 2 thereof. Appended to the present brief is a copy of a memorandum opinion of District Judge Webster entered in the same court February 24, 1937, in the case of *Palmer* v. *McCauley*. From these two opinions, and from the opinion of the Supreme Court of Washington in the present *Lindsey* case (R. 87), may be constructed the following record of the recent decisions of the State and Federal courts in the State of Washington on the subject involved in this case:

August 3, 1936, Judge Cavanah filed his first opinion in the case of *Andrus* v. *McCauley* to the effect that there was not sufficient reason shown to warrant the issuance of the writ of habeas corpus (Petition for Certiorari p. 64). This opinion is mentioned by the Supreme Court of Washington in its opinion (R. 91).

August 20, 1936, the Supreme Court of Washington filed its opinion holding that Ch. 114, Laws 1935, Rem, Rev. Stat. 10249 *et seq.* was not *ex post facto* in its application to the Lindseys, petitioners in this case.

November 21, 1936, upon consideration of an amended petition for *habeas corpus*, District Judge Cavanah filed his second opinion in the case of *Andrus* v. *McCauley*, holding

that Ch. 114, Laws 1935, Rem. Rev. Stat. 10249, was an *ex post facto* law as applied to the sentence of Andrus. Judge Cavanah held that the State trial court still had jurisdiction to impose a correct sentence, and he remanded the petitioner to the custody of the sheriff "to be taken before the State Superior Court of King County and sentence properly imposed" (Petition for Certiorari, p. 73).

February 24, 1937, District Judge Webster filed an opinion in *Palmer* v. *McCauley*, a *habeas corpus* case in which, as in the *Lindsey* case, the petitioner had been sentenced under the Act of 1935 for grand larceny committed before the statute went into effect. Judge Webster agreed with Judge Cavanah that the Act of 1935 was *ex post facto*, but, instead of remanding the petitioner for further sentence, he ordered the petitioner discharged. Judge Webster quoted from the opinion of the Supreme Court of Washington in the *Lindsey* case and said:

> "• • • the inescapable effect of the decision is that the act of 1935 governs the punishment for crimes committed prior to its enactment. Unless this is so there would have been no occasion to pass upon the question of the *ex post facto* character of that act, which the Court proceeded to do. This holding of the Supreme Court of the State of Washington that Chapter 114, Laws 1935, governs the punishment of crimes committed prior to its enactment is binding upon me. It amounts to an interpretation and construction of the Statutes of Washington, which a Federal Court is not at liberty to disregard. • • •
>
> "• • • The decision of the Supreme Court of Washington in the Lindsey case as I read it will not permit the resentencing of the petitioner under the laws in force at the time the crime was committed because 'at the time of the trial a new law had come into existence', namely, Chapter 114, Laws 1935. Unless such new law was applicable to Lindsey's case no new

law had come into existence which the Court could have considered in connection with the propriety or the legality of his sentence. No Superior Judge in the face of the decision in the Lindsey case could be expected to or would undertake to resentence the petitioner under the 'old' law. To do so would be to ignore the Supreme Court's holding in the Lindsey case. It would be idle, therefore, for me to remand the petitioner for resentence. The only alternative is to discharge the petitioner from his imprisonment."

Conclusion.

It is respectfully submitted that the decision of the Supreme Court of Washington that Chapter 114 of the Laws of 1935 governs the punishment of crimes committed before it became effective is binding upon this Court. The conclusion of the Supreme Court of Washington, however, that the Act of 1935 is not *ex post facto* when applied to such crimes is not binding on this Court. It is urged therefore that this Court determine that Chapter 114 of the Laws of 1935 is invalid as an *ex post facto* law as applied to the petitioners in this case, and that the case be reversed and remanded to the Supreme Court of Washington with instructions to take such further proceedings as are necessary to effect the discharge of the petitioners.

Respectfully submitted,

SPENCER GORDON,
Attorney for Elbert B. Lindsey and E. R. Lindsey, Petitioners.

APPENDIX.

Statutes Relating to Penalty for Grand Larceny Prior to Midnight June 12, 1935.

From Remington's Revised Statutes:

Sec. 2605, Grand Larceny—Penalty.—Every person who shall steal or unlawfully obtain, appropriate, bring into this state, buy, sell, receive, conceal, or withhold in any manner specified in Section 2601—,

• • •

(5) Property of the value of more than twenty-five dollars, in any manner whatever,

Shall be guilty of grand larceny and be punished by imprisonment in the state penitentiary for not more than fifteen years.

Sec. 2281, Indeterminate Sentences.—Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state penitentiary, or in the Washington State Reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and when no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment.

Sec. 2282. The board having control to determine period of imprisonment.—The state board of control, acting in conjunction with the warden of the state penitentiary, or the board of managers of the Washington state reformatory, acting in conjunction with the superintendent of such reformatory, as the case may be, may at any time after the expiration of the minimum term of imprisonment for which

such prisoner was committed thereto, direct that any prisoner confined in such institution shall be released on parole upon such terms and conditions as in their judgment they may prescribe in each case.

Sec. 10803. Parole Boards—Powers and duties.—The governor shall, from time to time, appoint parole boards, of three members, who shall, respectively, exercise all the powers and perform all the duties relating to the parole of prisoners from the state penitentiary and the Washington state reformatory, now vested in, and required to be performed by, the state board of control and the board of managers of the reformatory, respectively, and shall, from time to time, appoint a parole board, of three women, who shall exercise all the powers and perform all the duties relating to the parole and discharge of inmates from the women's industrial home and clinic, now vested in and required to be performed by, the board of directors of that institution. The members of all such parole boards shall hold office at the pleasure of the governor and shall each receive ten dollars per diem for time actually and necessarily spent in the discharge of their duties, and their actual and necessary traveling expenses, to be paid out of the moneys appropriated for supplies, material, and service, for the several institutions.

Material Provisions of Ch. 114, Laws 1935, Rem. Rev. Stat. Sec. 10249 et seq.

Rem. Rev. Stat. Sec. 10249-2.

SECTION 2. When a person is convicted of any felony except treason, murder in the first degree, carnal knowledge of a child under ten years, or of being a habitual criminal within the meaning of the statute which provides for life imprisonment for such habitual criminals, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only.

The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; if the law does not provide a maximum term for the crime for which such person was convicted, the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment; provided, however, that in any case where such maximum term is fixed by the court, that maximum term shall be fixed at not less than twenty (20) years.

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After the admission of such convicted person to the penitentiary or reformatory, as the case may be, it shall be the duty of the board of prison, terms and paroles to obtain from the sentencing judge and the prosecuting attorney, a statement of all the facts concerning such convicted person's crime and any other information of which they may be possessed relative to such convicted person, and it shall be the duty of the sentencing judge and the prosecuting attorney to furnish the board of prison, terms and paroles with such information. It will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance what, in their judgment, should be the duration of such convicted person's imprisonment.

Within six months after the admission of such convicted person to the penitentiary or the reformatory, as the case may be, the board of prison, terms and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

* * * * * * *

In case any convicted person undergoing sentence in the penitentiary or the reformatory commits any infractions of the rules and regulations of the penitentiary or reformatory, as the case may be, the board of prison, terms and paroles may revoke any order theretofore made determining the length of the time such convicted person shall be

imprisoned, and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted, or the maximum fixed by the court.

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Rem. Rev. Stat. Sec. 10249-4.

SECTION 4. The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or reformatory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him or her by the board of prison, terms and paroles, less time credits for good behavior and diligence for work as provided by this board; provided, that in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.

The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion.

The board of prison, terms and paroles may impose as a condition of a parole granted a convicted person that all or a portion of his or her credits earned, or to be earned, shall be forfeited in the event that such convicted person shall break his or her parole, or violate any law of the State or rule or regulation of the penitentiary or reformatory, as the case may be, or the board of prison, terms and paroles.

• • • • • • •

From and after the suspension, cancellation or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term.

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SECTION 9. Sections 2278, 2281, 2282, 2195, 10247, 10248, 10249, 10238, 10239, 10803, 10280-6, 10280-10, 10280-11, 10280-12, 10280-15, 10280-16, 10237-1 and 10237-2, of Remington's Revised Statutes of Washington, be, and the same are hereby repealed.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Filed in the U. S. District Court, Eastern Dist. of Washington, Feb. 24, 1937. A. A. LaFramboise, Clerk.

No. 5106.

J. R. PALMER, *Petitioner,*

vs.

J. M. McCAULEY, as Warden of the Washington State Penitentiary at Walla Walla, Washington, *Respondent.*

Memorandum Opinion.

WEBSTER, *District Judge:*

The petitioner was charged in the Superior Court of the State of Washington for Spokane County with the crime of grand larceny, committed on April 16, 1935. On September 21, 1935, he was convicted and sentenced to the penitentiary for 15 years. No minimum sentence was fixed by the Court as provided by Section 2281 Rem. Rev. Stat. notwithstanding that section was in force at the time of the commission of the crime. Section 2605 Rem. Rev. Stat. fixes the punishment for grand larceny at "imprisonment in the state penitentiary for *not more* than 15 years," leaving the minimum sentence to be fixed as provided by Section 2281, *supra.* The 1935 session of the legislature of Washington enacted Chapter 114 relating to persons convicted of felony, creating a board of prison terms and paroles and defining the duties of such board. Section 2 of this statute provides that the Court shall fix the maximum term of imprisonment only in certain felonies and that the maximum so fixed *shall* be the maximum provided by law for the crime of which the person sentenced was convicted. The statute does not empower the Court to fix a minimum sentence. Instead the act provides that within six months

after the admission of a convicted person to the penitentiary the board of prison terms and paroles "shall fix the duration of his or her confinement" which shall not exceed the maximum punishment prescribed by law. Section 9 of Chapter 114, Laws 1935, expressly repeals, among other statutes, Sections 2281 and 2282 of Remington's Revised Statutes of Washington. The repealing statute contains no express declaration that the provisions of the new law shall apply to crimes committed prior to its enactment. Notwithstanding the fact that Sections 2281 and 2282, Rem. Rev. Stat. were in effect on April 16, 1935, the date upon which the crime of which petitioner was convicted was committed, the Superior Court for Spokane County sentenced petitioner under the provisions of the act of 1935, which did not go into effect until midnight of June 12, 1935. The board of prison terms and paroles within six months after petitioner arrived at the penitentiary undertook, pursuant to the act of 1935, to fix the duration of his imprisonment at 5 years. Claiming that Chapter 114, Laws 1935, as to crimes committed prior to its effective date is ex post facto and therefore in violation of Article I, Section 10, of the Constitution of the United States, the petitioner has sued out a writ of habeas corpus.

Section 2006 Rem. Rev. Stat. of the State of Washington is a general saving statute effective in case of the repeal or amendment of criminal statutes. It reads as follows:

> "No offense committed and no penalty or forefeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses commited, or

penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein."

The nearest thing found in Chapter 114 in the nature of an express declaration of intention that the act of 1935 is to govern or be applicable to crimes committed before its enactment is this language in Section 4 of that act:

"The provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the penitentiary or reformatory to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all the inmates thereof."

Since this language refers to "convicted persons now serving time" it clearly has no bearing on cases where there had been no conviction and hence no one was serving time at the date on which the act in question went into effect. Furthermore, the language is qualified by these words: "The provisions of this act *so far as applicable thereto* are to apply, etc." The plain inference of this provision is that the act is not intended to cover cases where the crime had been committed prior to the enactment of the statute because in the absence of an express declaration of intention to that effect, as provided in Section 2006, supra, the act of 1935 would not be applicable to crimes committed before its enactment. In addition to this if this provision had been intended to cover all cases where the crimes had been committed before the effective date of the statute it would not have limited its operation to "convicted persons now serving time." An express declaration of legislative intention that a new criminal statute shall apply to crimes committed prior to the enactment of such statute ought not to be

couched in doubtful or uncertain terms. Such a declaration must be definite and explicit. It seems clear to me, therefore, that the language in Section 4 of the Act is not sufficient to meet the requirements of Section 2006, supra, and to remove the act from the saving provisions of that general saving statute. But in any event the language has no application to the petitioner's case because he had not been convicted and was not serving time when the act of 1935 went into effect and its language must be construed as of that date. The act became effective at midnight on June 12, 1935, and the petitioner was not convicted until September 21, 1935. If the question were an open one before me I should have no difficulty at all in reaching the conclusion that the act of 1935 does not apply to crimes committed prior to its enactment but that the punishment for such crimes is governed by the laws in force at the time of their commission, as provided in Section 2006, supra. The hereinabove quoted portion of Section 4 of the act is far from an express declaration to the contrary. However, in the case of State v. Lindsey, Volume 87, Page 298, Washington Decisions, the Supreme Court of Washington, sitting en banc, unanimously upheld a conviction for a crime committed prior to the taking effect of the act of 1935, notwithstanding the convicted persons were sentenced as provided by that act; the Court fixing the maximum punishment and providing no minimum punishment at all. In the course of the opinion the Court say:

> "A number of assignments deal with the sentence. At the time the crime was committed on April 15, 1935, the law provided that the court fix the penalty at not more than fifteen years imprisonment (Rem. Rev. Stat., Sec. 2605 (P. C. Sec. 8948)), and the minimum of not less than six months nor more than five years (Rem. Rev. Stat., Sec. 2281 (P. C. Sec. 8716)). At the time of the trial, however, a new law had come into existence (Chapter 114, Laws 1935, p. 308, 1935 Sup., Sec. 10249-1 (P. C. Sec. 4503-31) et seq.), which created a 'board of prison, terms and paroles' and provided, among other things (Sec. 10249-2 (P. C. Sec. 4503-32)):

> 'When a person is convicted of any felony • • • the court shall sentence such person to the penitentiary or • • • to the reformatory, and shall fix the maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, • • •
>
> 'Within six (6) months after the admission of such convicted person to the penitentiary or the reformatory • • • the board • • • shall fix the duration of his or her confinement • • •.'
>
> It is claimed by appellant that this is an ex post facto law and, therefore, violative of Art. I, Sec. 10, of the United States Constitution, which, among other things, prohibits a state from passing such a law."

It is true that upon the face of the opinion the Court does not notice or discuss Section 2006, Rem. Rev. Stat., but the inescapable effect of the decision is that the act of 1935 governs the punishment for crimes committed prior to its enactment. Unless this is so there would have been no occasion to pass upon the question of the ex post facto character of that act, which the Court proceeded to do. This holding of the Supreme Court of the State of Washington that Chapter 114, Laws 1935, governs the punishment of crimes committed prior to its enactment is binding upon me. It amounts to an interpretation and construction of the Statutes of Washington, which a Federal Court is not at liberty to disregard. The conclusion of the Court however that the act of 1935 is not ex post facto when applied to crimes committed prior to its enactment is not binding upon this Court. This is a Federal question which the Federal tribunals must determine for themselves for it calls for the application of the Constitution of the United States. In holding that the act of 1935 is not ex post facto when applied to prior offenses, the Court cited the opinion of the Honorable Charles C. Cavanah, United States District Judge, sitting in this Court in the case of Andrus v. McCauley, and filed at Walla Walla on August 5, 1936. Later, however, Judge Cavanah granted a rehearing in the case

and on November 24, 1936, filed a carefully prepared and well reasoned opinion in which he held the act of 1935, as applied to cases where the crimes involved had been committed prior to the taking effect of the act, was ex post facto and hence void as in violation of the Constitution of the United States. I do not feel that I can add anything of value to what has been said by Judge Cavanah in his opinion of November 24 in the Andrus case. To my mind it is conclusive. For the reasons assigned by him and upon the authorities cited by him in that opinion I am fully satisfied that the act of 1935 when applied to prior crimes is plainly ex post facto and void.

Having reached this conclusion, what disposition shall be made of the prisoner? Shall he be remanded to the Superior Court of Spokane County for resentence or shall he be discharged from custody? The petitioner was tried before the Honorable Charles H. Leavy, one of the Judges of the Superior Court for Spokane County and by him sentenced upon a verdict of guilty. Judge Leavy is no longer a judge of the Superior Court of Spokane County, having resigned therefrom in December, 1936. The contention has been urged that no judge other than Judge Leavy would be competent to resentence the petitioner even if he should be remanded to the Superior Court for resentence. I do not deem it necessary, however, to go into this difficult and much mooted question. I think the case can be disposed of on other and much more satisfactory grounds. The decision of the Supreme Court of Washington in the Lindsey case as I read it will not permit the resentencing of the petitioner under the laws in force at the time the crime was committed because "at the time of the trial a new law had come into existence", namely, Chapter 114, Laws 1935. Unless such new law was applicable to Lindsey's case no new law had come into existence which the Court could have considered in connection with the propriety or the legality of his sentence. No Superior Judge in the face of the decision in the Lindsey case could be expected to or would undertake to resentence the petitioner under the "old" law. To do so would be to ignore the Supreme Court's holding in the Lindsey case. It would be idle, therefore, for me to

remand the petitioner for resentence. The only alternative is to discharge the petitioner from his imprisonment. Order accordingly will be entered in due course at which time any incidental matters relating to appeal or the like can be provided for. Until the entry of the order petitioner will remain in custody. Counsel for petitioner will at the earliest possible date present an order in conformity with this opinion, after serving a copy thereof on counsel for the respondent together with notice of when such order will be presented for signature. Since the prisoner has been held to be entitled to discharge there must be no inordinate delay.

(8970-C)